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December 6, 2004

Lawrence Norton, Esq.
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re MUR 5542, Texans for Truth

Dear Mr. Norton:

Please find attached, on behalf of our client, Texans for Truth and Glenn Smith, as treasurer, a response to the complaint filed in the above-captioned matter.

Pursuant to your letter of December 3, 2004, your office denied our client's request for an extension of time to respond in this matter, because such request "is out of time." We note for the record that we believe the refusal to grant an extension – requested during the holiday week of Thanksgiving – to be unreasonable. The extension would not have been requested unless absolutely necessary. The lateness of the request was necessitated because this complaint was received by respondents during the final month of the hectic election cycle, during which they were on near constant travel away from the office.

Accordingly, because of the specious nature of this complaint and to ensure that the inadequacies contained therein, pertaining to both the legal standards applied and the facts provided, are fully presented to the Commission, we are providing you with this response on an expedited basis. However, we reserve the right to submit additional supplemental material, should we deem it necessary.

Sincerely,

Eric F. Kleinfeld
Counsel to Texans for Truth

Enc.

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December 6, 2004

Mr. Lawrence Norton, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5542 Respondents Texans for Truth and Glenn Smith, as Treasurer

Dear Mr. Norton:

On behalf of Texans for Truth, ("TFT") and Glenn Smith, as Treasurer, this letter is submitted in response to a complaint filed with the Federal Election Commission ("Commission") by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics ("Complainants") in the above-mentioned matter under review ("MUR").

In summary, this complaint disguises a complete lack of merit in language that is part invective and part gross exaggeration. Complainants attack the Commission as much or more than respondents. The complainants misstate the law and invent novel legal theories that do not apply to TFT or Mr. Smith, as Treasurer, to support their otherwise baseless complaint. They fail to provide facts or other information in support of their claims.

Respondents did not engage in a "scheme" despite the repeated use of the phrase by complainants nor did they circumvent the law. Instead, when viewed objectively and devoid of complainants' distortions, respondents have clearly complied with the law as it stands today If complainants – or the Commission – desire a change in the law, then the appropriate outlet is the legislative or regulatory process, rather than this MUR.

For the reasons set forth below, the Commission should find no reason to believe that TFT or Mr. Smith, as Treasurer, violated the Federal Election Campaign Act of 1971, as amended, ("FECA") or the Commission's regulations.

1. TFT is not a political committee.

TFT is a §527 political organization registered with the Internal Revenue Service. TFT is not a political committee required to register with the FEC. Complainants admit as much in their filing. While they flatly assert that TFT was formed to defeat President Bush, their support for that assertion says nothing of the kind. To the contrary, complainants cite a press release and a

press report that says nothing about defeating George W. Bush, but instead raises an issue concerning his National Guard service. In fact, complainants even attach the TFT IRS registration (Form 8871) which clearly and unequivocally states the group's purpose: "To educate voters on the records and views of candidates for public office and to promote interest in political issues and participation in elections " Nothing in this purpose or in the public record triggers registration under the current statutory standard.

The statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in FECA. 2 U.S.C. § 431(4).[1] In *Buckley v Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U S at 79-80. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

These terms were not redefined by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA), and the Supreme Court did not reinterpret them in *McConnell v FEC,* 124 S.Ct. 619 (2003). Congress enacted BCRA to carefully draw a second bright line for non-party, non-candidate organizations – targeted broadcast ads that run within 30 days of a primary election or 60 days of a primary election that refer to a clearly identified candidate for federal office may not be paid for by or with funds from a national bank, corporation, or labor organization. 2 U.S.C. §§434(f)(3); 441b(b)(2). Congress further required that the names and addresses of contributors who contributed $1,000 or more to the account used to pay for electioneering communications are disclosed within 24 hours. 2 U.S C. § 434(f). In *McConnell,* the Supreme Court held that this new bright line was constitutional, even if the ads did not contain express advocacy, because the electioneering communication "components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" does not apply to electioneering communications. *McConnell* at 689. BCRA did not amend FECA to require organizations that run electioneering communications to register as political committees nor did the *McConnell* Court impose such a requirement.

Accordingly, under FECA, 527 organizations such as Texans for Truth, operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees [2] This has been the law for thirty years and it remains so, today There is no basis for the FEC to change these rules in its enforcement process

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[1] (4) The term "political committee" means—

(A) Any committee, club, association, or other group of persons which received contributions aggregating in excess of $1,000 during a calendar year or while makes expenditures aggregating in excess of $1,000 during a calendar year, .

[2] Contrary to complainants' claims and regardless of the express or implied purpose of an organization, registration is not automatically triggered Only after the contribution or express advocacy thresholds are met is registration triggered

2. Recent Congressional action and the *McConnell* decision illustrate that there has not been fundamental change in the definition of "political committee" in FECA.

a. Congress Did Not Change the Definition of Political Committee

Congress has not changed the fundamental legal definitions of "expenditure" and "political committee" since the inception of FECA and the Supreme Court's review of its constitutionality in *Buckley* The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years covering seven presidential elections. A review of the history of amendments to FECA confirms this.

(1) 1997 – 1999 History of Legislative Proposals

In 1997, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176 (D D.C. 2003) This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107, 10108. Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176.

BCRA's sponsors abandoned their effort to redefine "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the .. bill." Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176 *quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001). The Commission explained in its brief to the District Court:

> In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, 'that constitute the most blatant form of [unregulated] electioneering.' 144 Cong. Rec. S906, S912 (Feb. 12, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which, in contrast to the earlier provisions of the McCain-Feingold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley*. Snowe-Jeffords was adopted as an amendment to both the Shays-Meehan and McCain-Feingold

bill, 144 Cong. Rec. H3801, H3802 (June 28, 2001). Brief for Defendants at 50, *McConnell v FEC*, 251 F.Supp. 2d 176.

As the sponsors explained, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v FEC,* 251 F Supp. 2d 176 (D.D.C. 2003). Accordingly, the definition of expenditures went unchanged.

(2) 2000 Legislation Regarding 527 Political Organizations

In 2000, Congress considered the growing number of political organizations that were not subject to the reporting requirements of FECA and passed legislation addressing 527s that are not Federal political committees. This law requires them to register with the IRS and file disclosure reports with the IRS listing their donors and disbursements – precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted).

The 527 disclosure law did not change the definition of "expenditure" or require these organizations to register as political committees with the FEC even though at the time this legislation was debated and enacted it was understood by Congress that 527 organizations that were engaging in non-express advocacy communications impacting Federal elections and were spending millions of dollars to do so. In his testimony before the House Ways and Means Committee on June 20, 2000, Senator McCain identified the lack-of disclosure as the problem that Congress needed to narrowly address. Quoting from a newspaper article Senator McCain stated that special interests "can donate unlimited sums to entities known as 'section 527 committees,' beyond the reach of the campaign-reporting laws designed to curb such abuses." *Disclosure of Political Activities of Tax Exempt Organizations*: *Hearing on H R 4717 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 106th Cong. (June 20, 2000) (statement of Sen. John McCain).

The Committee and Dissenting Views presented in the House Report shared the same reasons for changing the law to only require disclosure. Neither suggested that the solution to the problem was for 501(c) or 527 organizations engaged in the exempt purpose of "influencing or attempting to influence" a federal election to register as a political committee with the FEC or file disclosure reports with the FEC. The Committee was clear about its goal: "[T]he bill does not regulate political activities, but instead merely requires the disclosure of such activities..." H.R. Rep. No. 106-702, at 15 (2000).

Pro-reform Members argued for an even narrower disclosure bill than H.R. 4717 that did not cover 501(c) –organizations – one that was more likely to pass in 2000. H R. 4672 was a solution adopted by the House and Senate and approved by the President that only required 527 organizations to register and file periodic disclosure reports with the IRS – not the FEC. In the summer of 2000, Congress did not limit in any way a 527's ability to continue to legally engage in non-express advocacy communications for the exempt function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." Congress did not require any additional 527s to register as political

committees with the FEC and it did not change the FECA definition of political committee when it passed this legislation.

(3) 2002 BCRA History

In 2002, BCRA was passed to address two primary issues of concern related to soft money. First, it prohibits federal candidates and national party committees from raising and spending non-federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a Federal primary or general election. In BCRA, rather than amend the general definition of "expenditure," Congress tacked the new term "electioneering communications" to FECA's prohibition on corporate and labor union contributions. 2 U.S.C. § 441b(b)(2). The FEC explained to the Supreme Court that BCRA was "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime" because BCRA merely extended the reach of Federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds within a short time period before Federal elections. Brief for Appellees at 27, *McConnell v FEC*, 124 S. Ct. 619 (2003).

BCRA's Congressional sponsors supported the limited purpose of BCRA in their arguments to the Supreme Court in *McConnell*, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience ... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v FEC*, 124 S.Ct. 619 (2003). They argued that the express advocacy meaning developed over the years by the Court provided a guide for Congress into which they said the electioneering communication restriction was narrowly applied: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." Brief for Intervenor-Defendants at 59, *McConnell v FEC,* 251 F Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80).

The Congressional sponsors explained that BCRA was crafted by using the express advocacy analysis developed by the Court as a roadmap with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176, (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered to in framing (the electioneering communication provisions)." Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176.

In its argument to the Court, the FEC, too, was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications." "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly interested in airing electioneering communications may easily avoid the source limitation on such communications by simply ... running the advertisement outside the 30- or 60-day window..." Brief for Appellees at 92, *McConnell,* 124 S.Ct. 619. The FEC explained

that interest groups could continue to "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." Brief for Appellees at 95 n. 40, *McConnell,* 124 S.Ct. 619. BCRA's sponsors agreed: "[T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigns all fall outside its narrow scope..." Brief for Intervenor-Defendants at 158, *McConnell,* 251 F.Supp. 2d 176.

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cottage Sav Ass'n v Comm'r,* 499 U S. 554, 562 (1991) The administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress considered but abandoned. Post-*McConnell*, only Congress may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to craft the statute in a manner that demonstrates that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as McConnell so found regarding "electioneering communications." *See Anderson v Separ,* No. 02-5529, slip op. at 22 (6th Cir. Jan 16, 2004).

Thus, existing law remains unchanged in this area, as it has for thirty years. The Commission has no reason or Congressional authority to unsettle this area of the law in an enforcement action.

b. No Judicial Precedent from *Buckley v. Valeo* through *McConnell v. FEC* Changed the Definition of Political Committee

The FEC acknowledges in a recent Notice of Proposed Rulemaking (NPRM) that since *Buckley,* neither Congress nor the FEC has amended the FECA to change the definition of "political committee." NPRM, 69 Fed. Reg. 11736-37. Moreover, contrary to the complainants' assertion, no judicial precedent from Buckley through McConnell has changed the definition of political committee – nor could it.

In *Buckley*, the Court was concerned that the term "political committee...could be interpreted to reach groups engaged purely in issue discussion," noting that lower courts had interpreted the term "more narrowly" to include only those groups whose major purpose is the nomination or election of Federal candidates. *Buckley*, 424 U.S. at 79-80. In addition, the Court construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Similarly, the Court construed "contributions" as only those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

The Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Thus, the major purpose test in *Buckley* was a limitation on the number of groups that might otherwise qualify as political committees because they received "contributions" or made "expenditures" in excess of $1,000.

In *FEC v GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under *Buckley*, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859 (emphasis added). The FEC declined to appeal this decision. This interpretation was reaffirmed, post-*McConnell*, in *FEC v Malenick*, Civ. No. 02-1237, slip. op. at 8, (D.D.C. Mar. 30, 2004) (order granting summary judgment). Note that complainants state that "[I]t is the view if complainants that the district court in *GOPAC* misinterpreted the law." Complaint paragraph 19. It is wholly disingenuous for complainants to disregard both unfavorable court cases and the statute itself, in crafting a fictional legal standard which, by complainants' imagination alone, respondents are thought to have violated.

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure," contrary to the assertions made by some "born again" campaign finance reformers.[3] While the Court seems to suggest in *McConnell* that it may be constitutional for **Congress** to re-write the definitions of "political committee" or "expenditure" in the future to cover more than just express advocacy, the Court specifically re-affirmed that under current law, 527 groups "remain

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[3] In laying out the history of the Courts' rulings interpreting these key statutory terms, the *McConnell* Court said In *Buckley* we began by examining 11 U S C § 608(e)(1) (1970 ed Supp IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague " 424 U S , at 40-42, 96 S.Ct 612 We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate " *Id* At 43, 96 S Ct 612 We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' 'defeat,' [and] 'reject,'" *Id* At 44 n 52, 96 S Ct 612, and those examples eventually gave rise to what is now known as the "magic words" requirement

We then considered FECA's disclosure provisions, including 2 U S C §431([9]) (1979 ed Supp IV), which defined "'expenditur[e]' to include the use of money or other assets 'for the purpose of influencing' a federal election '" *Buckley*, 424 U S , at 77, 96 S Ct 612 Finding the 'ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id* At 77-78, 96 S Ct 612 (citations omitted) "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purpose of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate " *Id* At 80, 96 S Ct 612 (footnote omitted) *McConnell*, 124 S Ct at 688 (footnote omitted)

MCFL applied the same construction to the ban, at 2 U S C § 441b, on any corporate or labor union "' expenditure in connection with any [federal] election '" 479 U S at 249 See *McConnell,* 124 S Ct at 688 n 76

free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added). Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee.

3. The Commission itself recently declined to add a "major purpose" test to the definition of "political committee".

Complainants' claims hinge solely on the application of the major purpose test to TFT. In fact, they make it a requirement for finding a violation, titling it "prong 1". Yet the Commission recently made clear and unequivocal that it was not adding a major purpose test to the regulatory definition of political committee. *See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056 (Nov. 23, 2004). (The Commission is not promulgating any of the proposed rules . . .incorporating a major purpose test into the definition of political committee may be inadvisable.) The Commission recognized that such a test would have "entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of "political committee" is mandated by BCRA or the Supreme Court's decision in *McConnell*." *Id* at 68065.

The Commission's conclusion cuts the heart out of this specious complaint. Complainants rely on the major purpose test, an inapplicable legal standard, when, in fact, there is no basis, in statute or regulation, for this test. To the contrary, this test was rejected by the Commission. Complainants' sole support is the *Buckley* case, yet they distort and misconstrue what even the Commission has recognized as a narrowing test. *Id* ("The 'major purpose' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status.")

Recognizing the weakness of their legal argument, complainants overreach even further and conclude that any 527 organization meets the major purpose test. Thus, they have compounded a fictional analysis upon an inapplicable test Such a conclusion is nonsensical, and again, has been rejected already by the Commission. *Id* (The proposed changes to the definition of political committee would have "entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000".)

Accordingly, the complainants' fictional legal standard is inapplicable and the complaint should be dismissed for this reason.

4. Under the current law, not all 527s are political committees, and Texans for Truth did not trigger the existing statutory requirement.

a. Texans for Truth did not make any expenditures.

Without any legal support for their argument, complainants state that express advocacy is not required when analyzing the TFT public statements and ads for whether they constitute an expenditure. Complainants argue – incorrectly – that the standard is whether the activity promotes, supports, attacks or opposes ("psao") a candidate for federal office – yet offer not one citation or any other legal support for this claim.[4] The Commission has not adopted this standard for the regulated community, and, in fact, has recently declined to adopt it, in connection with the rulemaking on the definition of political committees.

Complainants cite only two facts to support their allegation that TFT made expenditures. The first of these is a citation to the TFT press statement released upon formation of the group. This statement contains no express advocacy, and complainants could point to none. This statement neither advocates the election of any candidate, nor does it advocate the defeat of any candidate. The statement does not refer to any election or to the electoral process or to voting or to taking any action. To the contrary, however, this statement does raise an issue – that of George W. Bush's National Guard Service – and seeks to make this issue part of the public debate. There is no basis in the language of this release for a finding that TFT made any expenditure, as defined by the Act and Commission regulations, in connection with the 2004 election.

Second, complainants argue that TFT has run an express advocacy ad. This, too, is false. No where does the ad state vote for or against George Bush or any other candidate. It does not reference the November elections. It does not say take our country back from George Bush. There are no electoral references. TFT has never run an ad containing express advocacy of the election or defeat of any candidate. TFT did make electioneering communications and did report them as duly required under BCRA and the Commission's regulations.

Other than complainant's bold and erroneous assertion, no information has been provided indicating that any TFT ad contained express advocacy. Interestingly, complainants never cite *any* content from TFT ads that they are complaining about. Instead, they simply conclude that the ads violate the law using the psao standard, without providing the language which is the supposed offending language. Such a claim is specious on its face, and for this reason alone, the complaint should be dismissed.

[4] Interestingly, complainants have not cited Commission Advisory Opinion ("AO") 2003-37 as support for this proposition This AO – issued to what appears to be a sham or non-existent organization – is inapplicable to TFT

b. Texans for Truth did not coordinate its ads with Kerry for President or the Democratic National Committee.

TFT has not made any payments coordinated with John Kerry for President, Inc. ("KFP") or the Democratic National Committee ("DNC"). The FEC established a three-prong test for determining if a communication is coordinated: (1) the communication must be paid for by someone other than a candidate or party committee; (2) the communication must meet a "content standard"; and (3) the interactions between the person paying for the communication and the candidate or political party committee must satisfy a "conduct standard." 11 C.F.R. §109.21. Complainants have not alleged coordination, and the facts in this matter do not meet the required conduct standard, therefore, the TFT television ads were not coordinated with KFP or the DNC.

Complainants' sole assertion is the fact that TFT ran television ads in so-called "battleground states," and as such, that must be evidence of a violation. Simply running ads in swing states, however, is not one of the six conduct standards carefully established by the FEC in 11 C.F.R. §104.9(21)(d)(1)-(6). For there to be coordination, there needs to be much more factual support that the ads were not independent. There is no evidence that any of the actual conduct elements established by the Commission were met.

The mere observation that an independent organization ran television ads in key states or markets that overlap with a candidate or party's media buy is not a sufficient basis upon which the Commission could find a reason to believe that a violation of FECA occurred. The observation of publicly available information is not a "self-evident truth" that coordination occurred or that an FEC investigation should be undertaken. There are a finite number of media markets in the United States. There are even smaller number of media markets when considering the states that were the battleground states in the 2004 elections – a conclusion that is neither novel nor vague to even the casual observer of presidential elections. At any given time, there will certainly be overlap between an independent organization's non-express advocacy ads, candidate ads, or party committee ads during every two- or four-year election cycle. Before a reason to believe finding can be made, much more than a chart of overlapping media buys should serve as the basis for a complaint that merits further investigation.

TFT did not in fact coordinate with KFP either on the content, placement, timing or any other aspect of its advertising. No specific information has been provided indicating that any of the prongs of the conduct standards, as contained in the Commission's regulations, has been violated. In sum, Complainants fail to provide a sufficient basis for finding a reason to believe that broadcasts in so-called swing states resulted in impermissible coordinated communications or any other violation by TFT.

4. In conclusion, this complaint provides no basis for finding reason to believe.

Finally, in conclusion, and for the reasons stated above, this complaint is devoid of any facts that would give rise to a violation of FECA and fundamentally misstates the currently applicable legal standard. Accordingly, the allegations that have been made are baseless and without merit. We respectfully request that the Commission find no reason to believe that any violation has occurred and close this matter as it pertains to TFT and Glenn Smith, as Treasurer.

Respectfully Submitted,

Eric Kleinfeld
Counsel, Texans for Truth and
Glenn Smith, as Treasurer